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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UNIGARD INSURANCE COMPANY,
Petitioner,

VS.

FORMICA CORPORATION and
AMERICAN CYANAMID COMPANY,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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**REPLY TO BRIEF IN OPPOSITION TO
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Petitioner Unigard Mutual Insurance Company respectfully submits the following brief in reply to the Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by respondents Formica Corporation and American Cyanamid Company.

**THE NINTH CIRCUIT'S UNPUBLISHED DECISION
IN THIS CASE IS IN DIRECT CONFLICT WITH
ITS OWN RECENTLY PUBLISHED OPINION IN AN
ALMOST IDENTICAL CASE**

In a case decided less than one week after the appeal in the instant case was argued, a different panel of the Ninth Circuit applied the rule of *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage Etc. Co.*, 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641 (1968), to interpretation of a surety bond. *United States, Etc. v. National Bonding & Acc. Ins. Co.*, 711 F.2d 131 (9th Cir. 1983).

In *National Bonding*, Standard Conveyor Company (Standard) had a construction contract with the Air Force, and obtained from National Bonding (National) a surety bond covering "all persons supplying labor and material" for the contract. Standard then entered into an agreement with United Electric (United) for the purchase of electrical materials to be used on the job. Before the job was completed, Standard defaulted on the government contract and filed a bankruptcy petition. United, which was still owed money for the materials, filed an action against National on the bond. National moved for summary judgment, contending that its bond did not cover United as a mere supplier of materials. National based its argument on the fact that the bond has been issued in reference to only one of two "line items" in the government contract, and that coverage thereunder should be limited accordingly. United argued that National's liability had to be determined by the terms of the bond without reference to the underlying government contract.

The District Court denied National's motion for summary judgment, ruling that because "no ambiguity as to the coverage appears on the face of the bond," the extrinsic evidence offered by National to show that suppliers were not covered would be "disregarded." 711 F.2d at 132-33.

The District Court subsequently granted summary judgment for United.

On appeal, National argued that the District Court had misapplied the parol evidence rule in refusing to construe the bond in light of the underlying contract. The Ninth Circuit agreed, stating:

The admissibility of parol evidence under California law is determined according to the procedure outlined in *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866 (9th Cir.), *cert denied*, 444 U.S. 981, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979)

. . .

Under the principles of *Brobeck*, it is clear that the court erred in not considering relevant extrinsic evidence offered by National to prove that coverage under the bond did not extend to suppliers Had the district court considered such evidence . . . it might have found the language of the bond reasonably susceptible to National's interpretation. Summary judgment on National's liability under the bond was thus inappropriate.

711 F.2d at 133-34 (emphasis added).

This is precisely what occurred in the instant case. The District Court granted respondents' motion for summary judgment on Unigard's liability under its policy after refusing to consider relevant extrinsic evidence offered by Unigard to prove that coverage under the policy did not extend to insure Formica and Cyanamid for their own fault. During the hearing on the motion for summary judgment, the District Court stated:

This question comes as the threshold question in the case. And, that is, whether or not the provisions of the Unigard policy are to be limited by terms and conditions contained in a contract to which it is not

a party. The so-called—I'll call it the Roberts' Contract.

• • •

It is the position of the plaintiff Unigard that . . . the court should make a determination as to whether there are any limitations on the obligation to provide . . . insurance contained in the [Roberts] contract.

I reject [that] interpretation.

Petition for Writ of Certiorari, Appendix E, pp. A-10, A-11.

Based on the clear and unequivocal holdings of the California Supreme Court in *Pacific Gas, supra*; the California Court of Appeal in *Dart Equipment Corp. v. Mack Trucks, Inc.*, 9 Cal.App.3d 837, 88 Cal.Rptr. 670 (1970); and the Ninth Circuit, interpreting California law in *National Bonding, supra*, the conclusion is inescapable that the District Court in this case erred in refusing to receive or consider relevant extrinsic evidence as to the intent of the parties to the Unigard policy. This evidence was offered in the form of the Roberts/Formica Agreement, which contract expresses the intent of Roberts and Formica, and thus expresses additionally the intent of Unigard, which intended only to carry out Roberts' insurance obligation as set forth in that underlying contract. Accordingly, summary judgment was improperly granted, and must be reversed.

THE DART DECISION SHOULD HAVE BEEN RECOGNIZED AS CONTROLLING BY THE LOWER COURTS

Respondents argue that even if the decision of the California Court of Appeal in *Dart, supra*, is apposite, it was not binding on the District Court and the Ninth Circuit because it does not represent the law of California as

announced by that State's highest court. (See Respondents' Brief in Opposition, pp. 8-11, citing *Lewis v. Anderson*, 615 F.2d 778 (9th Cir. 1979)). This is plainly wrong, and *Lewis, supra*, is inapplicable in this case.

In *Lewis*, the Ninth Circuit was "[sitting] as a state court" because "the California Supreme Court [had] never faced the issue presented" *Id.* at 781. In the instant case, the question to be determined by the lower courts was whether extrinsic evidence should be considered in ascertaining the meaning of Unigard's policy. The California Supreme Court *has* directly addressed this issue in its holding in *Pacific Gas, supra*, the antecedent of *Dart, supra*. The court there held, "the intention of the parties as expressed in the contract is the source of contractual rights and duties. A court *must* ascertain and give effect to this intention by determining what the parties meant by the words they used." 69 Cal.2d at 38-39, 69 Cal.Rptr. at 564-65, 442 P.2d at 644-45 (emphasis added). The court further held that it was error to exclude parol evidence regarding the intent of the parties to a written contract merely because the words do not appear ambiguous to the reader. *Id.*

Not only has this rule been well settled by the highest court of the State of California, it has also been recognized by the Ninth Circuit itself as controlling in cases involving contract interpretation. See *Brobeck, Phleger & Harrison v. Telex Corp.*, 602 F.2d 866 (9th Cir. 1979). Thus, *Dart, supra*, represents controlling state authority, and the District Court clearly erred in disregarding it.

THERE WAS NO AMBIGUITY IN THE UNIGARD POLICY

Respondents argue in contradictory fashion that determination of this case is controlled not by fundamental principles of contract interpretation, as expressed by the California courts in *Dart* and *Pacific Gas, supra*, but by the "long accepted" principle that ambiguities in an insur-

ance policy are to be construed strictly against the insurer. (See Brief in Opposition, p. 17.) This is incorrect for two reasons. First, respondents are forced to concede in almost the same breath that neither the District Court nor the Ninth Circuit found the Unigard policy to be ambiguous. (See Brief in Opposition, p. 18, fn. 7.) In fact, the District Court specifically stated: "It appears to me the policy on its face is quite clear . . ." (See Petition for Writ of Certiorari, Appendix E, p. A-12.) Secondly, even if there were an ambiguity in the policy, the holding in *Pacific Gas, supra*, is no less applicable. 69 Cal.2d at 40; 69 Cal.Rptr. at 565-66; 442 P.2d at 645-46.

THE PRICE CASE IS INAPPOSITE

Price v. Zim Israel Navigation Co., 616 F.2d 422 (9th Cir. 1980) is relied on heavily by respondents as support for the contention that the Roberts/Formica contract is irrelevant to the determination of whether or under what circumstances Formica and Cyanamid could be additional assureds under the Unigard policy. Although *Price* involved a fact situation similar to the present matter, the legal issue presented was significantly different.

In *Price*, a contract between Zim and ITS provided that ITS would add Zim as a co-insured on its own liability policy. Pursuant to that agreement ITS caused its insurance carrier to add to the policy a typewritten endorsement naming Zim as an insured. Several months later Zim and ITS executed a new contract which contained no requirement that Zim be named as a co-insured on the ITS liability policy. Neither Zim nor ITS requested that the then existing endorsement be cancelled, however. Shortly thereafter, Zim was sued by Price, an injured longshore worker. Tokio, the insurance carrier, refused to defend the suit, in part on the ground that the endorsement naming Zim as an insured had in effect been cancelled.

The focus of the *Price* court was directed to the very narrow issue of whether valid insurance coverage can be cancelled without any communication between the insurer and the insured. *Id.* at 427-28. There was no contention made that Zim had not been intended to be named in the endorsement. Similarly, neither Zim nor ITS argued that the endorsement had not been intended to afford Zim coverage co-extensive with that of ITS. Nor was there any affirmative expression of an intent that Zim's coverage should be discontinued.

Thus, *Price* stands for the proposition that an insurer may not decide, on its own initiative, that an insured wishes to cancel its coverage. The *Price* court's conclusion that the renegotiation of the Zim/ITS contract was irrelevant to Zim's status as an insured was based on the extant written endorsement specifically *naming* Zim as an insured under the policy.

In the instant case, there is no policy provision or endorsement naming Formica and Cyanamid as insureds under the Unigard policy. Here, Unigard's potential obligation to Formica and Cyanamid is measured by a contract (the Roberts/Formica Agreement) to which it was not a party. The only claim to coverage that Formica and Cyanamid can make must necessarily be based on Unigard's contract with Roberts, its insured, pursuant to which Unigard agreed to provide coverage in accordance with the terms of contracts negotiated by Roberts with various third parties. Thus, it is essential that the Unigard policy be construed in light of the underlying Roberts/Formica Agreement.

CONCLUSION

It is readily apparent that the Ninth Circuit's unpublished decision in this case is in direct conflict with that court's recently published opinion in *National Bonding, supra*. It is equally clear that the decisions of both the District Court and the Ninth Circuit were in error because of the courts' refusal to consider relevant extrinsic evidence of the parties' intent in construing the Unigard policy, as required by controlling California Supreme Court authority. Because the error in this case is so clear, and so fundamental, petitioner respectfully submits that summary reversal and remand are in order.

DATED: March 26, 1984

Respectfully submitted,

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